



January 24, 2000

Texas Growth Fund
111 Congress, Suite 2900
Austin, Texas 78701

OR2000-0227

Dear Sir/Madam:¹

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130965.

The Teacher Retirement System of Texas (the "TRS") received a request for "all information relating to or concerning 'HBW Holdings, Inc.('HBW') (Teacher Retirement System of Texas Alternative Assets, Texas Growth Fund - 1995 Trust).'" You argue against disclosure of the requested information on behalf of the TRS and the Texas Growth Fund (the "TGF").² You claim that the requested information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Since the property and privacy rights of third parties may be implicated by the release of the requested information, you notified HBW, whose information is responsive to the request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). HBW did not submit reasons why the requested information should be withheld from disclosure. Therefore, to prevent disclosure under section 552.110, the TGF must demonstrate, based on specific factual evidence, that disclosure would cause substantial competitive harm to HBW.

¹The request for a decision was submitted to this office under the acronym "TGF" in the signature line. We presume that the request for decision has been submitted in good faith and with the proper authority on behalf of the Texas Growth Fund Board of Trustees. Gov't Code §552.301.

²You state that the TGF possesses a fiduciary relationship with the TRS due to the fact that the TGF is trustee of the Texas Growth Fund-1995 Trust (the "1995 Trust") for which the TRS is a grantor. TRS has a right of access to information regarding the 1995 Trust including HBW Holdings, Inc. ("HBW") information. We note, however, that the governmental body by or for which information is "collected, assembled, or maintained" pursuant to section 552.002(a) retains ultimate responsibility for disclosing or withholding of information in response to a request under the Public Information Act, even though another governmental body has physical custody of it. Open Records Decision No. 576 (1990).

You have submitted representative samples of the requested information³ and you identify four responsive categories of information that the TGF wishes to protect from disclosure:

- (A) all summaries, “due diligence notebooks,” investment recommendations, investment memorandums[sic], valiative summaries and any documents prepared by the TGF, its agents, HBW Holdings, Inc., or any third party that provide information on the internal operations of HBW Holdings, Inc. (“Internal Operations Information”);
- (B) all materials and information prepared for the attendees of any briefing session of the TGF that was provided before or during such briefing session (“Briefing Materials”);
- (C) all quarterly and annual financial statements of the TGF or HBW Holdings, Inc. (“Financial Statements”); and
- (D) any other letter or communication from the TGF, TGF Corp., HBW holdings, Inc. or any representatives of the TGF, TGF Corp., or HBW Holdings, Inc. that provides any information regarding the internal operations of HBW Holdings, Inc. or the TGF (“Other Private Communications”).

The TGF argues that release of the information at issue would be harmful to the TGF’s and the TRS’ competitive positions in the private equity marketplace under section 552.104 and cause substantial competitive harm to HBW under section 552.110. You explain that the TGF and the TRS, as competitive investors in private securities, and HBW, as a private company, all share an essential interest in maintaining the confidentiality of the information at issue. Further, you claim that as a private company, HBW will suffer competitively if information is made public about its strategies, strengths, and weaknesses; and as an investor in HBW, the TGF and the TRS would suffer financially if HBW suffers due to disclosure of the information at issue.

Section 552.104 of the Government Code protects from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of section 552.104 is to protect the government’s interests when it is involved in certain commercial transactions. For example, section 552.104 is generally invoked to except

³In reaching our conclusion here, we assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. When a governmental body seeks protection as a competitor, however, we have stated that it must be afforded the right to claim the "competitive advantage" aspect of section 552.104 if it meets two criteria. The governmental body must first demonstrate that it has specific marketplace interests. Open Records Decision No. 593 at 4 (1991). Second, a governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.

The TRS is constitutionally responsible for the oversight and investment of the TRS Trust Fund, including its investment in the TGF and the private marketplace. Tex. Const. article XVI, 67(b)(3); Gov't. Code 825.301. Pursuant to its authority, the TRS has invested in the TGF. A member of the TRS Board of Trustees serves on the TGF's board. Tex. Const. article XVI, § 70(c)(3). If the TRS were required to disclose the proprietary and confidential information related to the TGF, the TGF and other private investment companies would be reluctant to consider TRS as a potential investor. This result would prevent the TRS from being a competitor in the private equity marketplace, which is an investment arena in which the Texas Constitution has provided the TRS specific authority to invest.

The TGF additionally argues that it is a competitor in the private equity marketplace. The submitted records reflect that the TGF does invest in and obtains information about the private marketplace. The TGF states that the submitted representative samples contain: information on HBW's business strategies and techniques; forecast and quantitative data; HBW briefing materials for the TGF; and, finance and valuation information. We believe that the TGF, while administering the TRS Trust Fund, and the TRS may be considered "competitors" for purposes of section 552.104. *See* Open Records Decision No. 593 (1987).

After reviewing your arguments, we also conclude that you have demonstrated that the TRS and the TGF have specific marketplace interests. You argue:

Disclosure of the information at issue in the four responsive categories would essentially cripple the TGF's ability to carry out its constitutional mandate. In the private equity marketplace, companies seeking private equity investors share confidential business plans and financial information with the TGF and the TRS. The companies trust that the TGF and the TRS will keep this information from other potential competitors. If the TGF and the TRS were to allow this confidential information to become public, the competitive position of the companies providing the information would be harmed in the private equity marketplace. These companies would then no longer provide

desired information to the TGF on potential investments, thus harming the TGF's and the TRS' competitive position in the marketplace.

Furthermore, the TGF argues that release of the information at issue in the four responsive categories would eliminate the TGF's and the TRS' competitive positions. The TGF contends that:

[t]he whole point of investing in the private equity marketplace is to capitalize on the individual knowledge each investor has as to the financial strength and possible future activities of certain private companies. If this knowledge were provided to the entire marketplace, the private investment vehicles would lose their 'private' nature and all the information that was so diligently and carefully assimilated would be available to any other investor, thus destroying any competitive advantage. The compelled release of such confidential information by the TRS would seriously harm the ability of the TGF and the TRS to compete for high quality private investments.

Based upon our review of the submitted information and arguments, we conclude that you have demonstrated actual or potential harm to the TGF's and the TRS' interests in a particular competitive situation. You have shown that releasing the documents will bring about a specific harm. The TRS and the TGF may withhold the submitted information under section 552.104.

Because we are able to make a determination under section 552.104, we need not address your other claimed exception. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

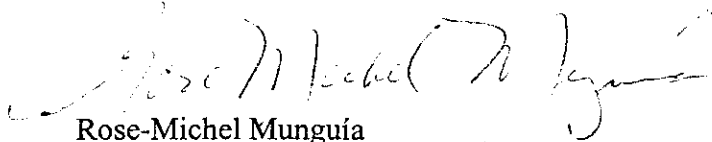
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Rose-Michel Munguía
Assistant Attorney General
Open Records Division

RMM/ch

Ref: ID# 130965

Encl. Submitted documents

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INITIATE
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(w/o enclosures)